



COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY

NORTHERN VIRGINIA REGIONAL OFFICE
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L. Preston Bryant, Jr.
Secretary of Natural Resources

David K. Paylor
Director

Jeffery A. Steers
Regional Director

STATE WATER CONTROL BOARD ENFORCEMENT ACTION

SPECIAL ORDER BY CONSENT

ISSUED TO

THREE FLAGS/CULPEPER, LLC.

FOR

THREE FLAGS – PHASE I
(VWP Permit No. WP4-03-2063)

SECTION A: Purpose

This is a Consent Special Order issued under the authority of Va. Code § 62.1-44.15(8a) and (8d) and 10.1-1185 between the State Water Control Board and Three Flags/Culpeper LLC, regarding the Three Flags – Phase I development, for the purpose of resolving certain alleged violations of the State Water Control Law and Regulations.

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Va. Code" means the Code of Virginia (1950), as amended.
2. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia as described in Va. Code §§ 62.1-44.7 and 10.1-1184.
3. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in Va. Code § 10.1-1183.
4. "Director" means the Director of the Department of Environmental Quality.

5. "Order" means this document, also known as a Consent Special Order.
6. "Original Permittee" means Three Flags Associates.
7. "NVRO" means the Northern Virginia Regional Office of DEQ, located in Woodbridge, Virginia.
8. "Permit" means Virginia Water Protection (VWP) General Permit Authorization No. WP4-03-2063, which was issued January 15, 2004 and expires on January 14, 2009.
9. "Three Flags" means Three Flags/Culpeper LLC, a Delaware limited liability company qualified to do business in Virginia, the current permittee, and the owner of the real property subject to the Permit from and after January 12, 2005.

SECTION C: Finding of Facts and Conclusions of Law

1. In 2003, Three Flags Associates (Original Permittee) proposed to construct a 357-acre mixed density residential community consisting of new-town style single family homes, larger single family estate lots, and condominiums in Culpeper County, Virginia. The first half of this project, which is the subject of the Permit, is known as Three Flags – Phase I ("Phase I").
2. Per their joint request dated July 18, 2005, the Permit was transferred from the Original Permittee to JCE, Inc. on August 15, 2005. Another joint request dated May 11, 2006 was received by DEQ that transferred the Permit from JCE, Inc. to the current Permit holder Three Flags on May 23, 2006.
3. On January 15, 2004, DEQ issued the Permit that authorized the Original Permittee to impact 0.66 acres of state waters consisting of: (1) 0.37 acre of palustrine forested (PFO) wetlands; (2) 0.05 acres of palustrine scrub-shrub (PSS) wetlands; (3) 0.05 acres of palustrine emergent (PEM) wetlands; (4) 259 linear feet (0.06 acres) of perennial (R3) stream channel; and (5) 1,133 linear feet (0.13 acres) of intermittent (R4) stream channel. Pursuant to the Permit, stream compensation would be in accordance with the Three Flags Final Stream Mitigation Plan ("Mitigation Plan") dated September 3, 2003 and revised October 7, 2003.
4. DEQ visited Phase I on January 4, 2005 and August 3, 2005 and noted that the required stream mitigation (i.e. planting of riparian buffers) had been initiated but not completed in accordance with the mitigation schedule. Furthermore, at the August 2005 site visit Angler Environmental ("Angler"), an authorized agent of Three Flags, informed DEQ that the length of the relocated stream was 92 linear feet longer than what was approved in the Mitigation Plan.
5. A historical file review conducted by DEQ revealed that the Original Permittee violated the

Permit by purchasing wetland credits from Blackjack Wetland Mitigation Bank on June 7, 2004 when the deadline was March 15, 2004 and by failing to submit documentation indicating whether conservation easements have been recorded along 1,392 linear feet of stream channel. Subsequently, DEQ approved Three Flags Declaration of Restrictive Covenants and Conservation Easement Plat on June 7, 2006.

6. Further alleged violations discovered during the file review included the Original Permittee failing to submit two annual mitigation monitoring reports for on-site stream compensation activities that were initiated prior to January 4, 2005; not including a construction schedule for completing work at each impact area with the Notice of Construction dated June 2, 2004; and not including pre-construction photographs for Impact No. 7 with the Pre-Construction Monitoring Report dated September 10, 2004. Finally, the file review revealed that the Original Permittee failed to monitor water quality parameters after rerouting the intermittent stream.
7. On January 26, 2006, Virginia Department of Conservation and Recreation ("DCR") staff inspected Phase I and observed substantial accumulation of sediment in Gaines Run between the outfall from the sediment basin and the culverts under the road crossing authorized by the Permit as Impact No. 10. In response to DCR's inspection and corresponding photographs sent to DEQ, DEQ staff visited Phase I on February 8, 2006 and noted that despite the installation of erosion and sediment controls that approximately half the stream channel was filled with sediment causing disruption of the stream flow.
8. On February 28, 2006, DEQ, Angler, and Three Flags representatives met to discuss permitting and compliance issues. Angler submitted a draft Gaines Run Stream Crossing Sediment Removal Plan ("Sediment Removal Plan") which outlined remedial actions that would be used to remove the sediment that accumulated in Gaines Run. A revised Sediment Removal Plan was submitted on May 30, 2006 and approved by DEQ on June 2, 2006. The sediment was removed from Gaines Run on June 19, 2006 in accordance with the Sediment Removal Plan.
9. The Board has evidence to indicate that the Original Permittee has violated the Permit by: (1) failing to purchase the required wetland credits within the 60-day deadline pursuant to Part II.A.2; (2) failing to submit documentation to DEQ that conservation easements for 1,392 linear feet of stream channel have been recorded pursuant to Part II.A.3.b; (3) failing to complete stream mitigation in accordance with the mitigation schedule pursuant to Part II.C.1; (4) relocating a stream channel to be 92 linear feet longer than what was approved for in the Mitigation Plan in violation of Part II.C.1; (5) failing to submit mitigation monitoring reports pursuant to Part II.C.3; (6) failing to provide a completion schedule with the Notice of Construction for work conducted at each impact area pursuant to Part II.E.2; (7) failing to submit pre-construction photographs for Impact No. 7 pursuant to Part II.D.1; (8) failing to

monitor for water quality parameters following rerouting of the intermittent stream channel at Impact No. 11 pursuant to Part II.D.4; and (9) taking unauthorized impacts to an additional 224 linear feet of stream channel and 0.19 acres of wetlands during the construction of Phase I in violation of Part III.I. The Board also has evidence to indicate Three Flags has violated the Permit by: (1) accumulating substantial amounts of sediment in Gaines Run that resulted in filling approximately half the stream channel and disrupting its flow in violation of Part I.C.5. DEQ issued Notice of Violation (NOV) No. 2006-04-NVRO-002 to Three Flags as the current permittee on April 21, 2006 for all of the above-referenced alleged violations.

10. Three Flags acknowledges that although the majority of the above-referenced alleged violations were caused by the Original Permittee, Three Flags was required and voluntarily agreed to the transfer of the Permit which included the liability for compliance with the requirements of any enforcement activities related to the permitted activity.
11. DEQ met with Angler and Three Flags representatives on May 23, 2006 to discuss the recent compliance issues. Angler notified DEQ that construction of Phase I by the Original Permittee resulted in additional impacts over what was approved in the Permit. The additional impacts resulted in an increase of permanent impacts of 0.01 acres of PFO wetlands, 0.18 acres of PEM wetlands, 154 linear feet (0.02 acres) of intermittent stream channel, and 70 linear feet (0.02 acres) of perennial stream channel.
12. To address the additional impacts Angler submitted to DEQ a revised Mitigation Plan on behalf of the current permittee to provide compensation for the additional 224 linear feet of unauthorized impacts that occurred during construction of Phase I. DEQ reviewed and approved the Mitigation Plan on June 23, 2006. The revised plan calls for an additional 231 linear feet of onsite stream mitigation that includes reestablishment of forested stream buffers through reforestation and the removal of existing invasive vegetation and further stream relocation and stabilization. The revised Mitigation Plan and supplemental mitigation have been incorporated into Appendix A to compensate for the previously unauthorized impacts.
13. Appendix A of this Order requires Three Flags as the current permittee to: (1) perform supplemental mitigation consisting of the purchase of 0.4 wetland credits from the Blackjack Wetland Bank; (2) perform supplemental mitigation consisting of a contribution to the Virginia Aquatic Resources Trust Fund; and (3) perform corrective actions as described in the revised Mitigation Plan.

SECTION D: Agreement and Order

Accordingly, the Board, by virtue of the authority granted it in Va. Code §§ 62.1-44.15(8a) and (8d) and 10.1-1185, orders Three Flags/Culpeper LLC and Three Flags/Culpeper LLC, as the current permittee, voluntarily agrees that:

1. Three Flags/Culpeper LLC shall perform the actions described in Appendix A of this Consent Order to remedy the alleged violations described above.
2. Three Flags/Culpeper LLC shall pay a civil charge of \$23,000 within 30 days of the effective date of the Consent Order in settlement of the alleged violations cited in this Consent Order. Payment shall be made by check payable to the "Treasurer of Virginia", delivered to:

Receipts Control
Department of Environmental Quality
Post Office Box 10150
Richmond, Virginia 23240

Either in the transmittal letter or as a notation on the check, Three Flags/Culpeper LLC shall indicate that this payment is submitted pursuant to this Consent Order and shall include the Federal Identification Number for Three Flags/Culpeper LLC.

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend the Order with the consent of Three Flags/Culpeper LLC, for good cause shown by Three Flags/Culpeper LLC, or on its own motion after notice and opportunity to be heard.
2. This Order only addresses and resolves those alleged violations specifically identified herein and listed above in Section C. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered alleged violations; (2) seeking subsequent remediation of the facility as may be authorized by law; or (3) taking subsequent action to enforce the Order. This Order shall not preclude appropriate enforcement actions by other federal, state, or local regulatory authorities for matters not addressed herein.
3. For purposes of this Order and subsequent actions with respect to this Order, Three Flags/Culpeper LLC admits the jurisdictional allegations, but neither admits nor denies the factual findings, and conclusions of law contained herein.
4. Three Flags/Culpeper LLC consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order by DEQ.
5. Three Flags/Culpeper LLC does not contest the Administrative Process Act, Va. Code § 2.2-4000 *et seq.*, and the State Water Control Law, and it waives the right to any hearing or other


administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to enforce this Order.

6. Failure by Three Flags/Culpeper LLC to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
8. Three Flags/Culpeper LLC shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other occurrence reasonably beyond the control of Three Flags/Culpeper LLC. Three Flags/Culpeper LLC shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Three Flags/Culpeper LLC shall notify the DEQ Regional Director in writing when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order.
 - a. Such notice shall set forth:
 - b. the reasons for the delay or noncompliance;
 - c. the projected duration of any such delay or noncompliance;
 - d. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
 - e. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director within three (3) business days of learning of any condition above, which Three Flags/Culpeper LLC intends to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto, their successors in interest, designees and assigns, jointly and severally.
10. Any plans, reports, schedules, permits, or specification attached hereto or submitted by Three Flags/Culpeper LLC and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.
11. This Order shall become effective upon execution by both the Director or his designee and Three Flags/Culpeper LLC. Notwithstanding the foregoing, Three Flags/Culpeper LLC agrees to be bound by any compliance date, which precedes the effective date of this Order.
12. This Order shall continue in effect until the Director or Board terminates the Order in his or its sole discretion upon 30 days written notice to Three Flags/Culpeper LLC. Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Three Flags/Culpeper LLC from his obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.
13. By his signature below, Three Flags/Culpeper LLC voluntarily agrees to the issuance of this Order.

And it is so ORDERED this day of September 11th, 2006.



Jeffery A. Steers, Regional Director
Department of Environmental Quality
Northern Virginia Regional Office

Three Flags/Culpeper LLC voluntarily agrees to the issuance of this Order.

THREE FLAGS/CULPEPER LLC, a
Delaware limited liability company

By: JCE 3 Flags, LLC, a Virginia limited
liability company, Manager

By: John E. Cowles
John E. Cowles, Manager

Date: 7/5/06

Commonwealth of Virginia

City/County of Prince William

The foregoing document was signed and acknowledged before me this 5th day of July, 2006,
by John E. Cowles, who is Manager of JCE 3 Flags, LLC, Manager of Three Flags/Culpeper LLC, a
Delaware limited liability company on behalf of said limited liability company.

[Signature]
Notary Public

My commission expires: 7-31-07

**APPENDIX A
SCHEDULE OF COMPLIANCE**

Three Flags/Culpeper LLC shall:

1. By no later than July 31, 2006, perform supplemental mitigation consisting of the purchase of 0.4 wetland credits from the Blackjack Wetland Bank located in Culpeper County, Virginia to compensate for the unauthorized impacts of 0.01 acres of PFO wetlands and 0.18 acres of PEM wetlands. Documentation of the transaction shall be submitted to DEQ within thirty (30) days of completion.
2. By no later than July 31, 2006, perform supplemental mitigation consisting of a contribution of \$71,176 to the Virginia Aquatic Resources Trust Fund to compensate for the unauthorized impacts of 154 linear feet (0.02 acres) of intermittent stream channel and 70 linear feet (0.02 acres) of perennial stream channel. Payment shall be made by check payable to the "Virginia Aquatic Resources Trust Fund" and delivered to:

Ms. Linda Crowe
The Nature Conservancy of Virginia
490 Westfield Road
Charlottesville, VA 22901

On the transmittal letter, indicate that this payment is submitted pursuant to this Order. Documentation of the transaction shall be submitted to DEQ within thirty (30) days of completion.

3. By no later than July 31, 2006, complete all corrective actions, except monitoring requirements, detailed in the revised Mitigation Plan that was approved by DEQ on June 23, 2006.
4. By no later than October 5, 2006, submit evidence to DEQ that the Declaration of Restrictive Covenants and Conservation Easement Plat approved by DEQ on June 7, 2006 have been recorded with Culpeper County.